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4 A.B., et al.,

5 Plaintiffs,

6 v.

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10 PACIFIC FERTILITY CENTER, et al.,

11 Defendants.  
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Case No. 18-cv-01586-JSC

**ORDER RE: ADMINISTRATIVE  
MOTIONS TO SEAL**

Re: Dkt. Nos. 301, 312, 352, 356, 369, 377,  
381, 383, 385, 392

13 In this negligence and products liability action Plaintiffs' motion for class certification and  
14 Chart's motion to strike certain of Plaintiffs' experts ("Daubert motion") are now pending before the  
15 Court. In connection with these motions, the parties filed 10 administrative motions to seal. (Dkt.  
16 Nos. 301, 312, 352, 356, 369, 377, 381, 383, 385, 392.) For the reasons explained below, these  
17 motions are GRANTED IN PART and DENIED IN PART.

18  
**LEGAL STANDARD**

19 "[T]he courts of this country recognize a general right to inspect and copy public records  
20 and documents, including judicial records and documents." *Nixon v. Warner Comm'nns, Inc.*,  
21 435 U.S. 589, 597 n.7 (1978); *see also Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1124,  
22 1134 (9th Cir. 2003) ("In this circuit, we start with a strong presumption in favor of access to court  
23 records."). The right is justified by the interest of citizens in "keep[ing] a watchful eye on the  
24 workings of public agencies." *Nixon*, 435 U.S. at 598. The right, however, "is not absolute and can  
25 be overridden given sufficiently compelling reasons for doing so." *Foltz*, 331 F.3d at 1135; *see*,  
26 *e.g.*, *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). "A narrow range of  
27 documents is not subject to the right of public access at all because the records have traditionally  
28 been kept secret for important policy reasons." *Kamakana v. City and Cty. of Honolulu*, 447 F.3d

1 1172, 1178 (9th Cir. 2006) (internal citations omitted); *see, e.g., Times Mirror Co.*, 873 F.2d at  
2 1219 (grand jury transcripts and warrant materials in the midst of a pre-indictment investigation  
3 not subject to right of public access).

4 This Court follows numerous other district courts within the Ninth Circuit in concluding  
5 that the compelling reasons standard applies to motions to seal documents relating to class  
6 certification. *See, e.g., Yan Mei Zheng v. Toyota Motor Corp.*, No. 17-CV-06591-BLF, 2019 WL  
7 6841324, at \*1 (N.D. Cal. Dec. 16, 2019) (collecting cases); *Fitzhenry-Russell v. Dr. Pepper*  
8 *Snapple Grp., Inc.*, 326 F.R.D. 592, 617 (N.D. Cal. 2018) (applying compelling reasons standard  
9 to motion to file class certification briefs and exhibits under seal because they “more than  
10 tangentially related to the merits of the case.”); *In re Seagate Tech. LLC*, 326 F.R.D. 223, 246  
11 (N.D. Cal. 2018) (applying compelling reasons standard to documents relating to class  
12 certification); *Racies v. Quincy Bioscience, LLC*, No. 15-cv-00292 HSG, 2017 WL 6405612, at \*2  
13 (N.D. Cal. Dec. 15, 2017) (applying the compelling reasons standard to a motion for class  
14 certification).

15 “A party seeking to seal a judicial record [] bears the burden of overcoming th[e] strong  
16 presumption [of public access] by meeting the ‘compelling reasons’ standard.” *Kamakana*, 447  
17 F.3d at 1178-79. The reasons must “outweigh the general history of access and the public policies  
18 favoring disclosure.” *Id.* at 1179 (internal quotation marks and citations omitted). Such compelling  
19 reasons include “the use of records to gratify private spite, promote public scandal, circulate  
20 libelous statements, or release trade secrets.” *Id.* (internal quotation marks and citation omitted).  
21 “The mere fact that the production of records may lead to a litigant’s embarrassment,  
22 incrimination, or exposure to further litigation will not, without more, compel the court to seal its  
23 records.” *Id.* Likewise, “[a]n unsupported assertion of ‘unfair advantage’ to competitors without  
24 explaining ‘how a competitor would use th[e] information to obtain an unfair advantage’ is  
25 insufficient.” *Ochoa v. McDonald’s Corp.*, No. 14-CV-02098-JD, 2015 WL 3545921, at \*1 (N.D. Cal.  
26 Jun. 5, 2015) (quoting *Hodges v. Apple, Inc.*, No. 13-cv-01128-WHO, 2013 WL 6070408, at \*2  
27 (N.D. Cal. Nov. 18, 2013)).

28 In addition, parties moving to seal documents must comply with the procedures set forth in

1 Civil Local Rule 79–5. The rule permits sealing only where the parties have “establishe[d] that the  
2 document or portions thereof is privileged or protectable as a trade secret or otherwise entitled to  
3 protection under the law.” Civ. L.R. 79–5(b). It requires the parties to “narrowly tailor” their requests  
4 only to the sealable material. *Id.* at 79–5(d). Thus, although sometimes it may be appropriate to seal a  
5 document in its entirety, whenever possible a party must redact. *See Kamakana*, 447 F.3d at 1183  
6 (noting a preference for redactions so long as they “have the virtue of being limited and clear”);  
7 *Murphy v. Kavo Am. Corp.*, 11-cv-00410-YGR, 2012 WL 1497489, at \*2–3 (N.D. Cal. Apr. 27,  
8 2012) (denying motion to seal exhibits but directing parties to redact confidential information).  
9 Whatever the basis, the court “must articulate [the] reasoning or findings underlying its decision to  
10 seal.” *Apple Inc.*, 658 F.3d at 1162.

## DISCUSSION

12 The parties have filed 10 administrative motions to seal in connection with Plaintiffs’ motion  
13 for class certification and Chart’s *Daubert* motion. The parties seek sealing of five categories of  
14 information: (1) Plaintiffs’ and the absent class members’ private health information; (2) information  
15 Chart designated as confidential or highly confidential under the parties’ protective order; (3) Chart’s  
16 “proprietary and/or confidential” “commercially sensitive trade secret and business information”;  
17 (4) Pacific MSO’s “regulatory communications with the PFC laboratory for which Pacific MSO  
18 provides support services”; and (5) Pacific MSO’s “confidential information regarding the  
19 equipment, practices, and operations related to the PFC laboratory for which Pacific MSO  
20 provides support services.” The Court address each in turn.

21 *First*, with respect to the Plaintiffs’ and absent class members’ health information,  
22 Plaintiffs only request sealing of their identities. This narrowly tailored request for sealing is  
23 GRANTED. Pacific MSO, in contrast, seeks sealing of a host of information which does not  
24 identify any Plaintiff or absent class member, but is derived from medical records. (Dkt. Nos. 316,  
25 356-1, 366, 393.) For example, the number of individuals with eggs and embryos in Tank 4, the  
26 number of class members who had eggs versus embryos in Tank 4, the number of children  
27 members of the class have, the age breakdown of class members, the time period class members  
28 froze their tissue in Tank 4, the number of class members who had eggs or embryos stored in other

1 tanks, the number of pregnancies and live births from Tank 4 eggs or embryos following the  
2 incident. None of this information is tied to a particular class member and neither the identities of  
3 the Plaintiffs or absent class members are publicly known. Under these circumstances, Pacific  
4 MSO has failed to demonstrate compelling reasons in support of its request for sealing and the  
5 request is DENIED.

6       **Second**, Chart seeks sealing of portions of its opposition to Plaintiffs' motion for class  
7 certification and declarations and exhibits thereto because they were designated as confidential or  
8 highly confidential pursuant to the parties' protective order. (Dkt. No. 352-1.) That material has  
9 been designated as confidential or highly confidential fails to demonstrate that it is in fact properly  
10 sealable confidential information subject to the compelling reasons standard. *See* N.D. Cal. L.R.  
11 79-5(d)(1)(A) ("References to a stipulation or protective order that allows a party to designate  
12 certain documents as confidential is not sufficient to establish that a document, or portions thereof,  
13 are sealable"). Accordingly, Chart's administrative motion to seal information in its class  
14 certification opposition and attachments thereto that it designated as confidential or highly  
15 confidential is DENIED. (Dkt. No. 352.)

16       **Third**, Chart seeks sealing of portions of Plaintiffs' motion for class certification, reply  
17 class certification brief, and exhibits attached to both briefs because they contain "proprietary  
18 and/or confidential information regarding Chart's business operations, processes, product testing,  
19 design, and functions, along with communications with its customers and vendors (whose  
20 information is not readily available to competitors), made in confidence and intended to be kept  
21 confidential" (Dkt. Nos. 308, 394). The mere fact that the information discloses Chart's business  
22 processes or information about its products, and design or testing of products and is therefore  
23 confidential is insufficient. "Simply mentioning a general category of privilege, without any  
24 further elaboration or any specific linkage with the documents, does not satisfy the burden."  
25 *Kamakana*, 447 F.3d at 1179. Nor is Chart's boilerplate assertion of competitive harm or trade  
26 secrets sufficient to meet its burden. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-  
27 01846 LHK PSG, 2013 WL 412864, at \*2 (N.D. Cal. Feb. 1, 2013) ("Although Samsung recites  
28 boilerplate terms that this information is proprietary and confidential, it does not provide a

1 particularized showing of how this information would be detrimental if disclosed.”); *Hodges v.*  
2 *Apple, Inc.*, No. 13-cv-01128-WHO, 2013 WL 6070408, at \*2 (N.D. Cal. Nov. 18, 2013)( “[a]n  
3 unsupported assertion of unfair advantage to competitors without explaining how a competitor  
4 would use the information to obtain an unfair advantage is insufficient.”); *Welle v. Provident Life*  
5 & *Accident Ins. Co.*, No. 3:12-cv-3016 EMC (KAW), 2013 WL 6055369, at \*2 (N.D. Cal. Nov.  
6 14, 2013)(“although [defendant] identifies the information at issue as proprietary and confidential,  
7 it does not provide reasons beyond the boilerplate references to competitive disadvantage if the  
8 information were publicly available.”); *Digital Reg of Texas, LLC v. Adobe Sys. Inc.*, No. 12-cv-  
9 1971-CW, 2013 WL 4049686, at \*1 (N.D. Cal. Aug. 8, 2013) (denying sealing where party  
10 “failed to state what harm [it] would experience if this material were publicly disclosed or to  
11 provide any specific reasons, supported by facts, that could outweigh the public policy favoring  
12 public access to court filings.”). Indeed, in *In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir.  
13 2008), upon which Chart relies, the Ninth Circuit was considering Electronic Arts’ request to seal  
14 a particular trial exhibit: a licensing agreement which contained trade secret pricing terms, royalty  
15 rates, and guaranteed minimum payment terms. No such specific showing has been made here  
16 with respect to the documents for which Chart seeks sealing. Accordingly, Chart’s request for  
17 sealing of information in Plaintiffs’ motion for class certification, reply class certification brief,  
18 and exhibits attached to both briefs is DENIED. (Dkt. Nos. 308 & 394.)

19       **Fourth**, Pacific MSO seeks sealing of “confidential information regarding the equipment,  
20 practices, and operations related to the PFC laboratory for which Pacific MSO provides support  
21 services” and “the policies and protocols related to PFC’s tissue storage for which Pacific MSO  
22 provides support services” because disclosure “would allow potential competitors and  
23 counterparties to gain insight...such that Pacific MSO’s business could be significantly harmed.”  
24 (Dkt. Nos. 316, 366, 379, 393.) As with Chart’s request for sealing of propriety business  
25 information, Pacific MSO’s boilerplate assertion of competitive disadvantage is insufficient and  
26 not narrowly tailored. Accordingly, Pacific MSO’s broad request for sealing of information  
27 regarding its equipment, practices, protocols, and operations is DENIED.

28       In contrast, Prelude’s (Pacific MSO’s parent) narrow request for sealing of the

1 Management Services Agreement and attachments thereto submitted as Exhibit I to the Sharp  
2 Declaration (Dkt. No. 301-14), which describes the confidential business arrangement between  
3 Prelude, Pacific MSO, and Pacific Fertility, and which the Court has previously held is properly  
4 sealable, is GRANTED. (Dkt. No. 315.)

5 **Fifth**, Pacific MSO seeks sealing of “regulatory communications with the PFC laboratory  
6 for which Pacific MSO provides support services” because “disclosure of this information would  
7 allow potential competitors and counterparties to gain insight into the laboratory’s regulatory  
8 status, policies and procedures, training, and patient information.” (Dkt. Nos. 316, 366, 393.)  
9 Beyond baldly asserting that its business could be significantly harmed if this information is  
10 disclosed, Pacific MSO has failed to offer any support for its request for sealing. “The mere fact  
11 that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure  
12 to further litigation will not, without more, compel the court to seal its records.” *Kamakana*, 447  
13 F.3d at 1178-79.

14 **CONCLUSION**

15 For the reasons stated above, the parties’ administrative motions to seal are GRANTED IN  
16 PART and DENIED IN PART. They are granted insofar as Plaintiffs seek sealing of their  
17 identities and Prelude seeks sealing of Exhibit I to the Sharp Declaration (Dkt. No. 301-14), but  
18 are otherwise denied as Defendants have failed to satisfy the strict compelling reasons standard.

19 **IT IS SO ORDERED.**

20 Dated: February 26, 2020

  
21 JACQUELINE SCOTT CORLEY  
22 United States Magistrate Judge  
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